INTERIM REPORT
OF THE NINTH CIRCUIT
TASK FORCE ON SELF-REPRESENTED LITIGANTS

November 2004

NINTH CIRCUIT TASK FORCE ON SELF-REPRESENTED LITIGANTS

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EXECUTIVE SUMMARY

Summary of Preliminary Recommendations
of the Ninth Circuit Task Force on Self-Represented Litigants

Following is a list of preliminary recommendations made by the six subcommittees of the Task Force to address the growing number of cases in all federal courts in the circuit in which one or more parties are not represented by counsel. The full Interim Report sets forth the operating premises of the Task Force and the work undertaken to date in developing the preliminary recommendations. There is much work yet to be completed. The comments received on the Interim Report will assist the Task Force in prioritizing that work and in developing a Final Report that has the benefit of public input.

Case Management

- The circuit should convene a pro se law clerk conference at least biennially. In addition to the pro se law clerk attendees, each district should consider designating one judge and/or one representative of the clerk of court to attend the conference. Topics should include trends and best practices for both prisoner and non-prisoner pro se cases. A report of the proceedings of the conference should be made available to each district promptly after its conclusion.

- Each district should consider designating one judge who is charged with primary oversight of the management of pro se cases, including the appointment of pro bono counsel, educational materials, and staffing innovations.

- The memoranda and proposed model local rules for vexatious litigants and early merit screening contained in Appendices C and D should be disseminated to the districts for their consideration and possible implementation.

- Districts should be encouraged to develop mediation, early neutral evaluation, and other alternative dispute resolution methods in pro se cases. Assistance should be sought from the Ninth Circuit Standing Committee on Alternative Dispute Resolution, the Federal Judicial Center, and other sources.

- Districts should review the prison ombudsman materials contained in Appendix F to determine whether such programs might be successfully initiated or expanded in their jurisdictions. In the absence of a circuit-wide conference on the subject, districts should involve prison officials, defense counsel, and public agencies in a dialogue on this subject.

- Districts should review the pro se law clerk survey data and their own case statistics to determine whether their staffing is adequate to process both prisoner and non-prisoner pro se cases in a timely manner. If appropriate, changes in the pro se law clerk staffing formula should be pursued.

- Districts should also review the pro se law clerk survey data, as well as the case management summaries contained in Appendix G, to assess whether they can reduce the amount of judge time in screening pro se cases of all types by adjusting their staffing and case management procedures. Districts should periodically evaluate whether their pro se caseloads are best served through elbow law clerks assigned to individual judges, elbow law clerks assigned to more than one judge, or a central pool of pro se law clerks working for all judges. Consideration should also be given to having certain pro se law clerks specialize in a given area, such as Social Security cases, habeas petitions, prisoner civil rights cases, and non-prisoner civil rights cases. Consideration should be given to assigning one or more pro se law clerks the responsibility for administrative tasks such as form preparation, development of rules and orders, and training, thereby enabling other staff to concentrate exclusively on individual case management.

Appointment of Counsel

- Each district should consider adopting a formal program for the appointment of pro bono counsel. The program should be published and include a screening mechanism.

- Each district should consider appointing a pro bono coordinator responsible for establishing and maintaining a pro bono panel, securing appointments, and related duties.

- Each district should work with its own judges, bar associations, and law schools to provide training and educational materials for pro bono counsel as needed.

- Each district should consider utilizing all available resources, including the use of limited representation, advisory counseling, mediation programs, law students, and attorney admission funds to increase pro bono representation.

- Each district should explore ways to increase pro bono representation by the bar, including enhanced recruitment efforts through web sites, conferences, and other means.

- The judicial council should consider appointing a standing committee on pro bono representation and a circuit-wide pro bono coordinator, and creating a program for intra-circuit pro bono appointments.

Cooperation with Prisons and Prosecutors

- The circuit should convene a meeting of representatives from the Federal Bureau of Prisons and all state correctional departments within the circuit. The twin purposes of the conference would be to improve access to legal materials, mail, assistance, and equipment; and to explore further development of prison ombudsman approaches in addition to existing grievance procedures.

- Courts should also explore the use of court resources to develop their own ombudsman programs. For example, the Northern District of California is using a part-time magistrate judge to provide such a service in one prison in the district.

- The circuit should convene a similar meeting of representatives from all state Attorneys General and United States Attorneys within the circuit to discuss waivers of service of process and other procedures for reducing delay in prisoner cases.

- If necessary, the circuit should seek outside funding to convene these meetings.

Pro Se Education

- District courts should review the educational materials, if any, available to pro se litigants and evaluate whether they could be doing more to provide information about court procedures. The Table of Contents of the manual contained in Appendix K provides a useful checklist of topics suitable for information sheets or pamphlets.

- Courts should encourage local law schools and bar associations to develop educational materials for pro se litigants. The circuit's lawyer representatives could also assist in that effort. Assisting in the preparation of educational materials is one means of discharging a lawyer's pro bono responsibilities.

- Particular attention should be paid to providing information on service of process and appropriate methods of bringing matters to a court's attention. Each court should review its procedures and determine whether letters from pro se litigants are appropriate. The policy should then be communicated to pro se litigants.

- The California state courts have developed the position of small claims court advisor to provide basic information and answer the questions of pro se litigants. District courts should examine, where feasible, the possibility of providing a similar resource through the auspices of a local law school or bar association. Such state court initiatives as legal information kiosks, self-help centers, forms, and signs should also be considered.

- If authorized by the courts, clerks' offices should consider providing access to case management/electronic case filing (CM/ECF) and related training materials to pro se litigants.

Habeas Corpus Education

- Because education of prisoners is lacking, particularly in the areas of procedure and pre-filing requirements, each court should evaluate the information it currently provides and determine whether it can or should do more.

- Although it is not practical for the Task Force to be directly involved in the creation, distribution, or update of any written self-help materials, courts should explore whether any law school or bar association would be willing to assume such responsibilities.

- The circuit should create a directory of information and make it available to prisons, perhaps electronically, in order to direct pro se habeas petitioners to materials that are already available.

- The subject of habeas educational materials should be addressed at any circuit court or district sponsored conference with prison wardens and/or prosecutors.

- State-federal judicial councils should explore a coordinated system of post-conviction relief in state and federal courts. Possible options include publication of a post-conviction relief manual for each state, and a regional state-federal conference devoted to a coordinated system.

Data Collection

- Steps should be taken to ensure that clerks' offices receive adequate training and written instructions regarding the importance of collecting and maintaining data in pro se cases.

- Under CM/ECF, the status of pro se litigants should be "flagged" so that standard reports can be generated to track pro se cases (both prisoner and non-prisoner) by nature of suit and stage of disposition.

- The Administrative Office of the U.S. Courts, in conjunction with the courts, should customize CM/ECF on a national basis so that standard reports can be generated that reflect all categories and types of pro se litigants, the status of each case, and the disposition by stage of proceeding. Case aging reports should be available on all pro se cases.

I. INTRODUCTION
by
Hon. James K. Singleton
Chair, Task Force on Self-Represented Litigants

According to data from the Federal Judicial Center, during Fiscal Year 2002 pro se cases represented 32.4 percent of all civil filings in the Ninth Circuit. This four-year high resulted from a decrease in total civil filings, coupled with a 1.6 percent increase in pro se civil filings. Responding to this trend, in the fall of 2002 the Judicial Council of the Ninth Circuit approved the formation of a Task Force to study problems posed by the increasing proportion of civil cases that were being filed by unrepresented litigants. Chief Judge Schroeder appointed the members of the Task Force shortly thereafter.

The Task Force was given the charge of considering the impact on all courts in the circuit of actions brought by unrepresented litigants and making recommendations for improving the administration of those cases. For a general definition of the courts and the judicial processes that are discussed in this report, see the Glossary at Appendix A. While we considered pro se litigation in all courts, we focused on the district courts. The large number of unrepresented litigants poses challenges to traditional case management in pre-trial matters and at trial, and different strategies need to be devised to respond to those challenges, both in the clerks' offices and in judicial chambers.

The Judicial Council amplified the charge by requesting that the Task Force:

1. Study and evaluate existing case management practices in pro se cases;
2. Study and evaluate existing assistance to litigants in pro se cases;
3. Explore alternative case management practices and methods of assisting pro se litigants;
4. Publicize such alternative methods and solicit feedback with respect to them;
5. Aid in the development and monitoring of such programs;
6. Make recommendations to the Judicial Council, the courts of this circuit, and the bar with respect to management of pro se cases and assistance to unrepresented litigants;
7. Undertake such other activities as are consistent with the Task Force's mission.

The work of the Task Force has been divided among six subcommittees, which are addressing: 1) case management, 2) appointment of counsel, 3) cooperation with prisons and prosecutors, 4) pro se education, 5) habeas corpus pro se education, and 6) data collection. The remainder of this interim report will address the work to date of each subcommittee and their preliminary recommendations. Before proceeding to that discussion, however, some relevant belief systems must be addressed.

This interim Task Force Report is a beginning, not a conclusion; we are setting out our views in order to provoke the reader to respond and share his or her own views. If we have made factual errors, we hope that they will be pointed out. If we have overlooked policies or problems, we hope that our readers will educate us. The administration of justice is everybody's responsibility. We hope that everybody will share in seeking and finding solutions.

A. The Premises and Orientation of Our Adversary System

Put simply, the current justice system and the various rules of civil, criminal and appellate procedure, as well as the rules of evidence that govern trials, are all fashioned to serve the "adversary system." Central to the adversary model of judicial administration is the idea of the trial judge as a "generalist" neutral whose areas of expertise are procedure, both civil and criminal, and evidence. The model does not expect trial judges to know much about the specific areas of substantive law involved in the cases that come before them. Rather, the model assigns to each party's lawyer the responsibility of knowing the substantive law involved in the cases they litigate. It is the lawyer's task to educate the generalist judge to the specifics of a particular case. Even in those cases where the lawyers are not specialists, counsel do, under this model, recognize their responsibility to study the law involved in a case thoroughly before bringing it or responding to it. Under the adversary model, judges expect that lawyers will recognize the legal problems their cases pose and then through mastery of research will exhaustively marshal the determinative decisions, speeding the way to a swift and fair result.

Knowing the substantive law is only half of a lawyer's responsibility. Equally important is a lawyer's duty to know the facts and assure through control of pre-trial investigation that all available evidence has been canvassed and all important witnesses interviewed. In the adversary system, the court and its employees are neutrals and have no responsibility to develop the facts, locate witnesses or assemble evidence.

Marshaling the facts and researching the substantive law are two of the most important responsibilities the adversary system assigns to lawyers in the preparation of their cases for trial. Two closely related duties, which every judge expects the attorneys to perform long before a case enters the court's docket, are evaluating whether a legal claim exists based on the available facts, and screening out frivolous aspects of an otherwise valid claim. The lawyer meets with the prospective client, gently extracts the important facts, and in the process provides the client a reality check on what can and what cannot be accomplished in court. The lawyer thereby heads off meritless cases before they reach court. Furthermore, when the client has one arguable claim coupled with an emotional litany of non-claims, the lawyer screens the claim to eliminate its frivolous aspects. Lawyers routinely perform these functions because, among other reasons: (1) as officers of the court they may be sanctioned for filing improper or unwarranted pleadings, (2) they do not want to expend economic and other resources on doomed claims, and (3) they want to maintain a reputation with the court for candor and diligence. Indeed, it is the absence of this screening and evaluation process by a lawyer that primarily distinguishes the pro se litigant from the represented litigant.

To summarize, then, the unrepresented litigant presents the court with an initial challenge: his or her case has not been screened by a trained lawyer. In order for the court to manage the case effectively, someone must screen the case and determine the material law and facts.

B. Differing Perspectives on Pro Se Litigation

It is a cornerstone of our judicial system that every litigant who comes to court is entitled to a fair hearing. There are different perspectives, however, about how to fulfill that promise to

unrepresented litigants. Some judges and lawyers are convinced, for example, that pro se litigants as a class generally bring meritless claims, and that any program designed to educate or assist them would only increase the number of meritless claims in the court system. This point of view is doubtless influenced by those pro se cases that are brought by individuals suffering from a mental disability or for purposes of harassment. Closely related to that thought is the belief that appointing attorneys for pro se clients is a waste of resources and in the long run simply complicates efforts to keep the system clear of meritless cases.

On the other hand, many judges and lawyers recognize that pro se litigants have been responsible for such landmark decisions as *Gideon v. Wainwright*, 372 U.S. 335 (1963), which significantly changed the legal landscape. Furthermore, the United States Supreme Court and this circuit have recognized that there are instances in which due process requires special efforts to inform pro se litigants of important procedural nuances. See Appendix B for a discussion of the case law. In any event, the fact that a party is unrepresented does not necessarily indicate that a lawyer was first consulted and determined that the claim lacked merit.

C. Alternatives Beyond the Scope of the Task Force

Philosophically, one approach to the challenge of pro se litigation would be a complete overhaul of the judicial system. Thus, one could revamp the system to create two tiers: 1) a first tier open only to litigants who had retained or been assigned counsel and would proceed under the rules as currently drafted, and 2) a second tier, operable when at least one party was pro se, in which the case would be exempted from the rules and instead be subjected to a different system. Four options for "second tier" justice come to mind. First, all pro se plaintiffs could be required to file their complaints with an administrative judge who would interrogate them to draw out the relevant facts, assign a public employee investigator to investigate those facts and evaluate the evidence for the administrative judge, and determine whether the case has sufficient potential merit to proceed. Otherwise, the case would be dismissed, perhaps subject to some internal administrative appeal procedure to check against errors. Second, small claims court procedures could be made universally applicable to unrepresented litigants regardless of the amount in controversy. Third, pro se cases could proceed in court, but without enforcement of the Federal Rules of Civil Procedure. Instead, a pre-Rules system of pleading could be reinstated. Under this "precode" practice, very little discovery was allowed. Most lawyers and judges believe that the primary cost and delay in the current system lies in liberal discovery.[1] Fourth, a single tier governed by the various federal rules could remain in place, but all pro se litigants would be required to pursue a combination of early neutral evaluation/mediation in the hopes of resolving matters early without substantial investment of judicial time and resources.

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[1]In 1997 the Research Division of the Federal Judicial Center studied discovery at the request of the Judicial Conference of the United States Advisory Committee on Civil Rules. It found that discovery was a substantial part of the expense of most litigation, but that in most cases lawyers thought that the amount of discovery permitted was about right. See Thomas E. Willging , Donna Stienstra, John Shepard, Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments,* 39 Boston College L. Rev. 525 (1998).

D. Feasible Alternatives to the Challenge of Pro Se Litigation

Realistically, the Task Force recognizes that no such major changes in the administration of justice are likely to result from its work. The federal rules are here to stay.[2] The Task Force has therefore concentrated its efforts on ways of assisting the unrepresented litigants and the courts under the present system of justice. One significant emphasis has been on finding lawyers for those who want them but cannot afford them or do not know how to find them. We have also considered various unbundling proposals and related procedures to involve lawyers to the greatest extent possible. Recognizing that it is unrealistic to expect that a lawyer will take every case, or that the litigant will always accept a lawyer, we have studied various ways that courts can perform the screening function and provide the reality check that lawyers would otherwise provide, without a significant impact on court staff and budgets. In this regard we have noted that Congress has expressly provided for increased screening in two situations: where litigants are prisoners or wish to proceed in forma pauperis. We are exploring ways consistent with the Constitution and existing statutes to extend pre-service screening to other aspects of pro se litigation. For example, we have carefully considered those cases dismissed for lack of subject matter jurisdiction because they were frivolous. We have also looked at the quantity and quality of materials furnished to various classes of litigants to familiarize them with court procedures and considered the tension between providing information and legal advice.

Ultimately the challenge presented by the unrepresented litigant is to provide due process of law to all the men and women who submit their cases to the courts for determination, not just those who are represented by counsel. As this is a work in progress, we look forward to receiving your thoughts.

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[2]Similarly, although the issue of language barriers affects pro se litigants' access to the courts, it was also deemed outside the scope of the Task Force. The Task Force acknowledges, however, that there is a need for future consideration of language barriers, their impact on all forms of interaction between citizens and the judiciary, and possible solutions.

II. Case Management Subcommittee

A. Efforts to Date

This subcommittee's mission is to address staffing and other case management proposals to reduce judge time spent on pro se cases. The subcommittee was charged with determining how each district staffs and screens its pro se cases, and making specific recommendations with respect to best practices and suggested innovations. The subcommittee was also asked to consider whether an annual or biennial pro se law clerk conference should continue to be held; whether district court retreats should include pro se staff; whether specific judges should be assigned to mediate pro se complaints; whether prison ombudsman programs can be created; and whether and how mediation and/or early neutral evaluation can be expanded in pro se cases. In addition, the subcommittee looked at early judicial screening mechanisms for pro se cases.

The subcommittee has focused on case management in the district courts, but also collected some information about the Court of Appeals and Bankruptcy Courts. The Ninth Circuit Court of Appeals maintains a central office of staff attorneys in its San Francisco headquarters; the attorneys do not work for any particular judge and are part of the clerk's office. The attorneys screen all new appeals and petitions for review, whether filed by counsel or pro se litigants, for jurisdictional defects, fee status, frivolity, and case management issues. They present jurisdictionally defective and clearly meritless appeals to motions panels of circuit judges for their determination regarding whether the appeal should be dismissed or disposed of summarily by the court prior to briefing on the merits. They also present certain fully briefed appeals to screening panels of circuit judges for adjudication where the appeal presents only a few issues and the law in the circuit is clear with respect to those issues. In addition, the staff attorneys monitor frequent filers for vexatious litigant status and screen new appeals filed by those who have been previously determined by the court to be vexatious litigants. Finally, the circuit has a well established and long-standing formal Pro Bono Program.

Case management in bankruptcy courts is characterized by generally shorter case length and a greater emphasis on form pleading than is the practice in district courts. Although each district's bankruptcy court has its own procedures, in general the bankruptcy judges are accustomed to direct involvement with pro se litigants and direct management of their cases.

In order to investigate more specific issues, the subcommittee held several conference call meetings, gathered information from a variety of sources, and commissioned a survey, implemented by the Office of the Circuit Executive, concerning staffing of pro se cases. The information obtained by the subcommittee and its preliminary recommendations follow. The subcommittee also gathered information at the 2004 Pro Se Law Clerk Conference.

The following survey data describes the functions performed by district court pro se law clerks. As is apparent from review of the survey data, pro se law clerks play a vital role in processing the pro se cases assigned to them for initial review. For the past several years the circuit has convened periodic pro se law clerk conferences. Review of past conference agendas and comments by pro se law clerks demonstrate that the opportunity to receive training and to share best practices in the management of pro se cases has been invaluable, and the conferences should continue to be held. With respect to including pro se law clerks in annual district

conferences or court retreats, the subcommittee determined that clerks are, and should continue to be, invited to participate in segments of programs that specifically address pro se case management.

The subcommittee has reviewed a memorandum and model local rule proposed by the Ninth Circuit Advisory Board to address the subject of vexatious litigants, contained in Appendix C, and a proposal from Task Force member Ann Taylor Schwing concerning early termination of non-meritorious cases, contained in Appendix D. The subcommittee has included both proposals for consideration by the district courts, which can best evaluate whether such local rules would be beneficial.

The subcommittee has just begun to explore the use of mediation, early neutral evaluation, and other alternative dispute resolution mechanisms for pro se cases. Materials on existing pro se programs in the Northern District of California and the District of Idaho are contained in Appendix E. Another proposal addressing the use of prison ombudsman programs, designed to resolve disputes before a case is filed, is contained in Appendix F. Preliminary review of these programs indicates that they can be effective in satisfactorily resolving many disputes.

On July 2, 2004, the Task Force distributed a questionnaire to pro se law clerks in an attempt to assess the current range of pro se functions. The goal was to collect information that would inform debate about operational reforms. Specifically, the subcommittee intended to explore how the role of pro se law clerks varies and how pro se law clerk time is distributed.

The survey included a 13-question section of both open-ended and multiple option questions and a table of possible work categories in which to record hours over a two-week period (July 12th through July 23rd). The research team obtained and updated a contact list of pro se law clerks, to whom the survey was emailed. Of 78 pro se law clerks, the Task Force received responses from 60, yielding a 77 percent response rate.

The initial survey analysis reveals the following:

- The majority of pro se law clerks work on non pro se cases to some degree.
- Only 3.3 percent of pro se law clerk hours were spent on non-prisoner cases.
- Nearly all pro se law clerks make recommendations that some cases be dismissed because they lack merit.
- §1983 and §2254 prisoner cases dominated the pro se law clerk workload.
- The review of habeas corpus petitions represents the most time-consuming stage of case management.
- Whether highly concentrated workloads were spent on §1983 or §2254 cases varied by district.

These findings are discussed in more depth in the following research summaries.

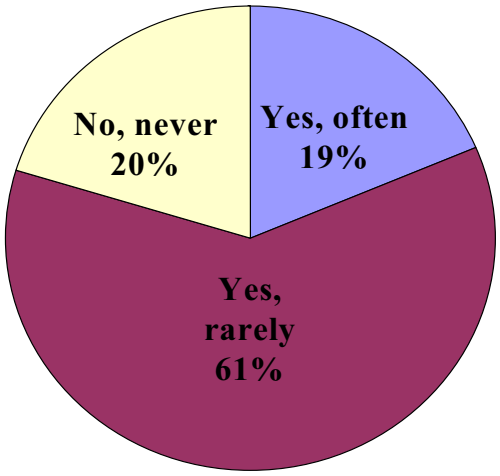
PRO SE LAW CLERK (PSLC) SURVEY
1. PRELIMINARY FINDINGS

A recent survey conducted by the Ninth Circuit Task Force on Self-Represented Litigants polled pro se law clerks about their job responsibilities and the amount of time they spent on different types of casework during the two-week period July 12 through July 23. As of August 11, 2004, 60 pro se law clerk surveys were received from the following districts.

ALASKA	1	IDAHO	2
ARIZONA	6	MONTANA	2
CA CENTRAL	14	NEVADA	4
CA EASTERN	13	OREGON	3
CA NORTHERN	6	WA EASTERN	1
CA SOUTHERN	6	WA WESTERN	2

We originally contacted 78 pro se law clerks and have received surveys from 60, a 77 percent response rate. Preliminary findings from these surveys follow.

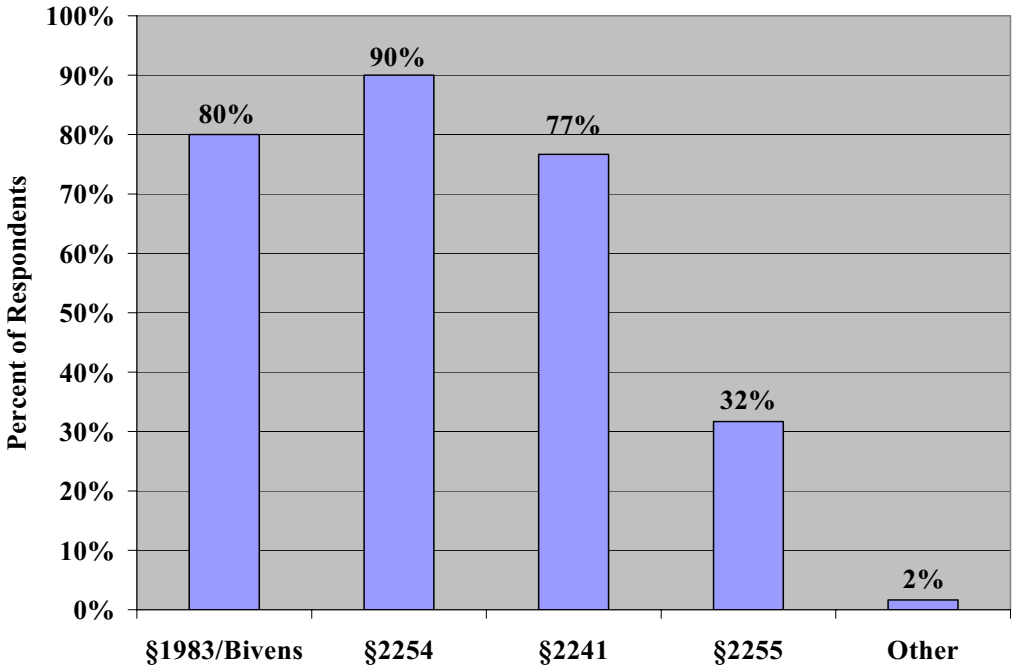
Do you work on non pro se cases?



Of 60 pro se law clerk surveys, 2 respondents did not answer the question and 1 respondent marked 2 answers ("Yes, often" for habeas and "Yes, rarely" for civil rights cases). The majority (61 percent) responded that they work on non pro se cases, but rarely. The types of non-pro se cases noted by respondents were:

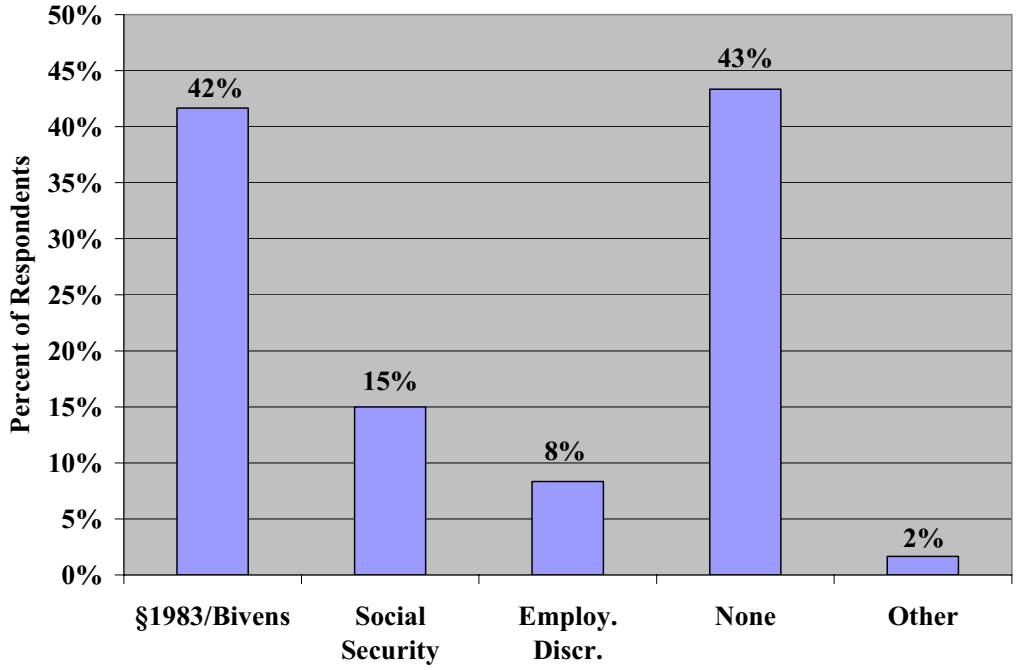
- Prisoner cases
- Habeas Corpus
- Social Security
- §1983
- §2241
- §2254

On what type of prisoner cases do you work?



Ninety percent of respondents work on §2254 cases, 80 percent on §1983/Bivens, 77 percent on §2241 and 32 percent on §2255. The 2 percent of respondents who reported "Other" described work related to §1361, FTCA, extradition cases, motions for injunctive relief, motions for return of property, mandamus/coram nobis and, in some cases, "all civil actions brought by prisoners."

On what type of non-prisoner cases do you work?



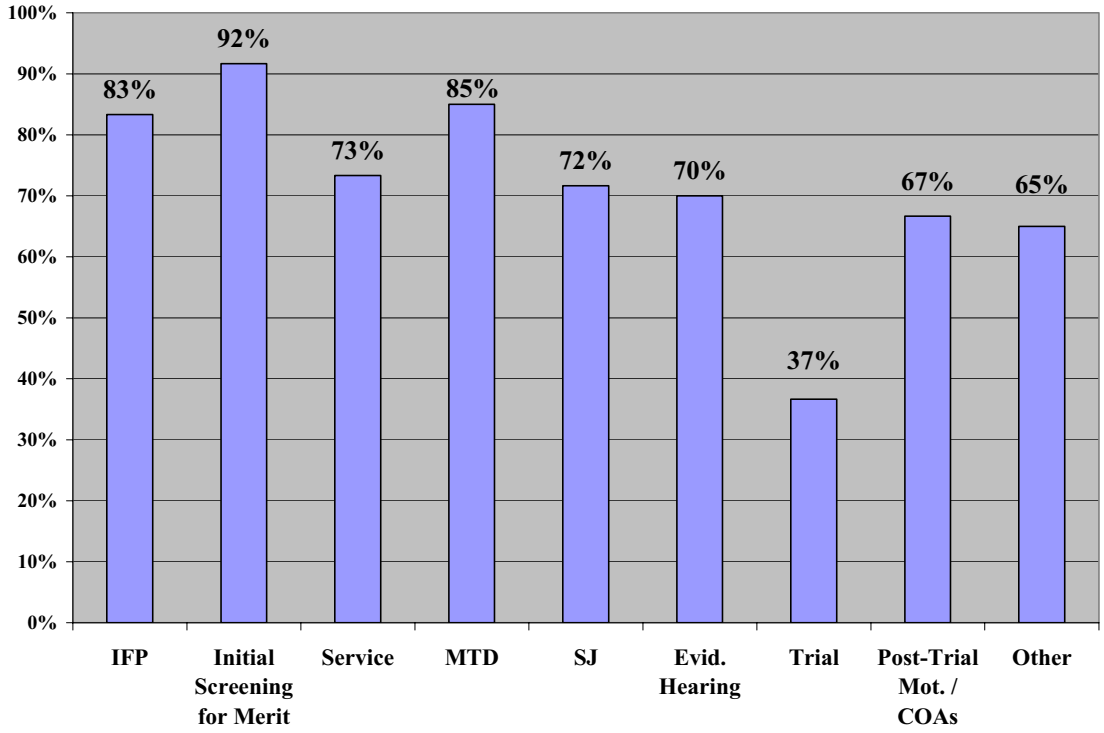
The most common type of non-prisoner case on which pro se law clerks work is §1983/Bivens. Of 25 respondents who work on non-prisoner §1983/Bivens cases, 6 (43 percent) were in Central California, 4 (100 percent) in Nevada, 3 (50 percent) in Southern California, 2 (100 percent) in Idaho, 2 (100 percent) in Montana, 2 (67 percent) in Oregon, 2 (15 percent) in Eastern California, 1 (100 percent) in Alaska, 1 (17 percent) in Arizona, 1 (100 percent) in Eastern Washington and 1 (50 percent) in Western Washington.

Forty three percent of respondents reported that they work on "none" of non-prisoner cases. These responses were most prevalent in Arizona and the Eastern District of California, in which 83 percent and 77 percent of pro se law clerks fell into this category respectively.

How many PSLCs work on "none" of non-prisoner cases?				
AZ	5	(83 %)	of	6 PSLCs
CA, C	3	(21 %)	of	14 PSLCs
CA, E	10	(77 %)	of	13 PSLCs
CA, N	4	(67 %)	of	6 PSLCs
CA, S	3	(50 %)	of	6 PSLCs
OR	3	(50 %)	of	6 PSLCs

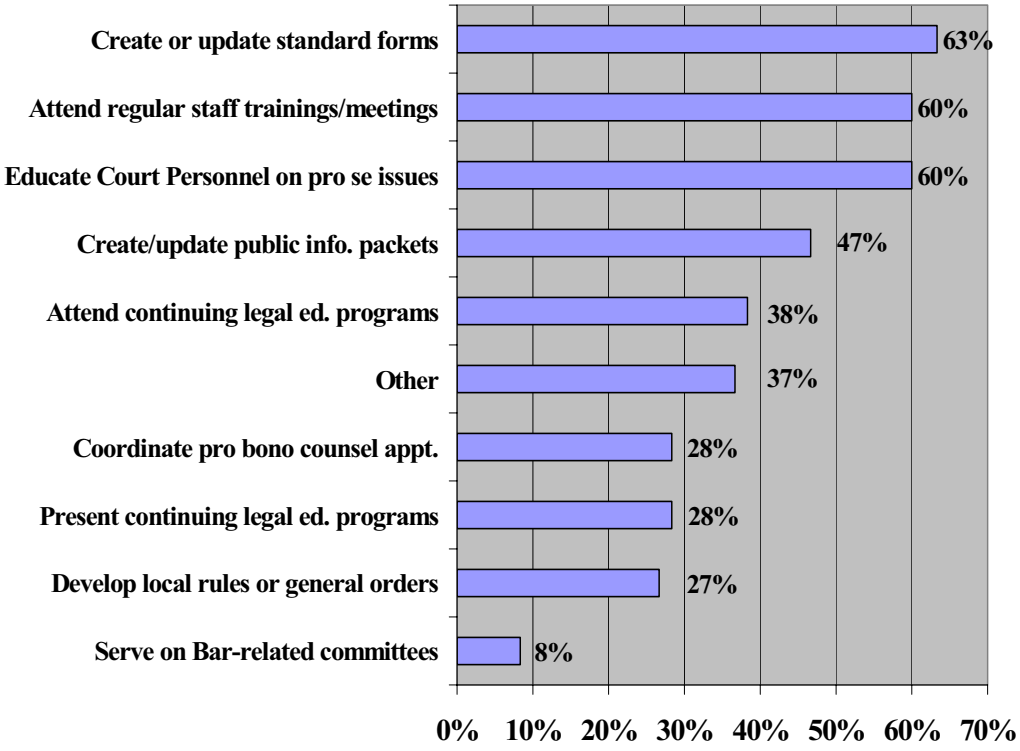
*Only those districts in which at least one PSLC reported that they work on none of non-prisoner cases were included.

For what stages of case management are you responsible?



A majority of respondents (over 60 percent) are responsible for reporting their research and recommendations to the assigned judge at each stage of case management except for the trial. Only 37 percent of respondents consider the trial to be their responsibility.

What other duties do you have as a pro se law clerk?



The most common activities considered to be the responsibility of pro se law clerks are creating or updating standard forms (63 percent of PSLCs), attending regular staff trainings or meetings (60 percent of PSLCs) and educating court personnel on pro se issues (60 percent of PSLCs). The most common "other" activities included updating a legal database, supervising externs, hiring staff, and reporting to judges.

Do you make recommendations that certain cases be dismissed because they lack merit?

Nearly all respondents make recommendations that certain cases be dismissed because they lack merit.

2. HOW DO PRO SE LAW CLERKS SPEND THEIR TIME?

Circuit Total

On average, pro se law clerks spent a majority (91.2 percent) of their time on prisoner cases, while only 3.3 percent of their time was spent on non-prisoner cases. §2254 and §1983 prisoner cases dominated the workload with 50.8 percent and 34.9 percent of pro se law clerk hours respectively. The stage of case management that required the most time was habeas merits, with 38.6 percent of total pro se law clerk hours.

PERCENT OF TIME SPENT BY PRO SE LAW CLERKS

	PRISONER					NON-PRISONER				GENERAL	TOTAL
	§ 1983	§ 2254	§ 2241	§ 2255	Other	§ 1983	Social Sec.	Employ. Discr.	Other		
IFP	1.8%	0.6%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.1%	0.0%	2.7%
Initial Screening - Merit	11.4%	3.7%	1.1%	0.3%	0.1%	0.2%	0.0%	0.1%	0.0%	0.0%	16.9%
Habeas Merits	0.0%	36.6%	0.9%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.8%	38.6%
Service	0.7%	0.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.1%
Motions to Dismiss	4.6%	4.7%	0.0%	0.0%	0.2%	0.1%	0.0%	0.2%	0.0%	0.0%	9.8%
Discovery Motions	0.5%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.6%
Evidentiary Hearing	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.1%
Summary Judgment	10.2%	0.6%	0.0%	0.0%	0.0%	0.0%	1.2%	0.0%	0.0%	0.0%	12.0%
Trial	0.4%	0.0%	0.0%	0.0%	0.0%	0.1%	0.0%	0.0%	0.0%	0.0%	0.5%
Post-Trial Mots./COAs	0.8%	0.8%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.7%
Admin. Case Mgmt	2.2%	1.5%	0.2%	0.1%	1.2%	0.0%	0.0%	0.0%	0.0%	1.3%	6.4%
Misc.Office Work	0.5%	0.5%	0.0%	0.0%	0.5%	0.1%	0.0%	0.0%	0.0%	1.7%	3.2%
Other:	1.9%	1.5%	0.1%	0.0%	0.3%	0.3%	0.5%	0.0%	0.3%	1.5%	6.3%
TOTAL	34.9%	50.8%	2.4%	0.8%	2.3%	0.9%	1.7%	0.3%	0.4%	5.4%	100.0%

Prisoner §2254 Cases

Of the 2145.7 total hours that pro se law clerks committed to prisoner §2254 cases, 72.0 percent were spent on habeas merits.

PRISONER §2254 CASES, HOURS BY STAGE OF CASE MANAGEMENT		
	Hours	**Percent of Total**
IFP	26.1	1.2%
Initial Screening for Merit	155.2	7.2%
Habeas Merits	1544.7	72.0%
Service	13.9	0.6%
Motions to Dismiss	198.5	9.2%
Discovery Motions	0.5	0.0%
Evidentiary Hearing	4.3	0.2%
Summary Judgment	26.0	1.2%
Trial	0.0	0.0%
Post-Trial Motions/COAs	33.7	1.6%
Admin. Case Mgmt	62.4	2.9%
Misc. Office Work	19.0	0.9%
Other	61.7	2.9%
TOTAL	2145.7	100.0%

Prisoner §1983 Cases

The 1472.9 hours spent on prisoner §1983 cases were concentrated in initial screening, summary judgment and motions to dismiss stages. These three categories comprise 74.9 percent of the §1983 casework.

PRISONER § 1983 CASES, HOURS BY STAGE OF CASE MANAGEMENT		
	Hours	**Percent of Total**
IFP	74.6	5.1%
Initial Screening for Merit	481.2	32.7%
Habeas Merits	0.0	0.0%
Service	30.7	2.1%
Motions to Dismiss	192.8	13.1%
Discovery Motions	22.8	1.5%
Evidentiary Hearing	0.8	0.1%
Summary Judgment	429.1	29.1%
Trial	16.0	1.1%
Post-Trial Motions/COAs	35.3	2.4%
Admin. Case Mgmt	91.8	6.2%
Misc. Office Work	19.5	1.3%
Other	78.5	5.3%
TOTAL	1472.9	100.0%

Type of Case

Six districts spent over 90 percent of pro se law clerk hours on prisoner cases.

- Eastern California spent 97.8 percent of hours on prisoner cases.
- Northern California spent 93.2 percent of hours on prisoner cases.
- Southern California spent 93.4 percent of hours on prisoner cases.
- Nevada spent 95.9 percent of hours on prisoner cases.
- Oregon spent 96.0 percent of hours on prisoner cases.
- Western Washington spent all hours on prisoner cases.

In nine districts, over 50 percent of hours were allocated to either §1983 or §2254 prisoner cases.

§1983

Arizona spent 58.6 percent of hours on §1983 cases.
Eastern California spent 52.8 percent on §1983 cases.
Idaho spent 87.6 percent on §1983 cases.
Montana spent 62.0 percent on §1983 cases.

§2254

Central California spent 77.1 percent on §2254 cases.
Northern California spent 61.2 percent on §2254 cases.
Southern California spent 62.9 percent on §2254 cases.
Nevada spent 71.0 percent on §2254 cases.
Oregon spent 51.2 percent on §2254 cases.

TYPES OF CASE, PERCENT OF TOTAL BY DISTRICT

	PRISONER CASES					NON-PRISONER CASES				GENERAL	TOTAL
	§ 1983	§ 2254	§ 2241	§ 2255	Other	§ 1983	Social Sec.	Employ. Discr.	Other		
AK	20.0%	17.8%	0.0%	4.4%	0.0%	17.8%	0.0%	0.0%	0.0%	40.0%	100.0%
AZ	58.6%	9.8%	15.0%	1.7%	1.9%	0.0%	0.0%	0.0%	0.0%	13.0%	100.0%
CAC	9.6%	77.1%	0.3%	0.0%	0.3%	1.3%	7.6%	0.0%	0.0%	3.8%	100.0%
CAE	52.8%	36.5%	4.2%	0.6%	3.7%	0.3%	0.0%	0.2%	1.1%	0.6%	100.0%
CAN	32.0%	61.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	6.8%	100.0%
CAS	28.4%	62.9%	1.5%	0.3%	0.3%	2.4%	0.0%	0.0%	0.0%	4.2%	100.0%
ID	87.6%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	12.4%	0.0%	0.0%	100.0%
MT	62.0%	17.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	2.2%	18.7%	100.0%
NV	16.3%	71.0%	0.7%	0.2%	7.7%	1.3%	0.1%	1.4%	0.9%	0.5%	100.0%
OR	40.3%	51.2%	3.6%	0.0%	0.9%	0.0%	0.0%	0.0%	0.0%	4.0%	100.0%
WAE	42.7%	17.3%	6.0%	0.0%	0.0%	0.0%	0.0%	0.0%	1.6%	32.3%	100.0%
WAW	22.0%	39.0%	0.0%	39.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%

Stages of Case Management

The amount of time spent on different stages of case management varied by district.

- Habeas merits required more pro se law clerk time than other stages in Central California, Northern California, Southern California, Nevada, Oregon and Western Washington.
- Initial screening for merit required more pro se law clerk time than other stages in Alaska, Arizona and Eastern Washington.
- Summary judgment required more time than other stages in Eastern California, Idaho and Montana, although initial screening for merit ran a close second in Montana.

A single stage of case management required more than 50 percent of pro se law clerk hours in four districts.

- In Alaska, pro se law clerks spent 51.1 percent of hours on initial screening for merit.
- In Arizona, pro se law clerks spent 69.5 percent of hours on initial screening for merit.
- In Central California, pro se law clerks spent 76.5 percent of hours on habeas merits.
- In Idaho, pro se law clerks spent 77.9 percent of hours on summary judgment.

STAGES OF CASE MANAGEMENT, PERCENT OF TOTAL BY DISTRICT

	IFP	Initial Scrng. for Merit	Habeas Merits	Service	Motions to Dismiss	Discovery Motions	Evidentiary Hearing	Summary Judgment	Trial	PostTrial Mots/COAs	Admin. Case Mgmt	Misc. Office Work	Other	TOTAL
AK	4.4%	51.1%	0.0%	4.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	4.4%	26.7%	8.9%	100.0%
AZ	3.7%	69.5%	2.5%	0.3%	2.2%	0.0%	0.2%	2.8%	0.0%	1.5%	7.2%	5.3%	5.0%	100.0%
CAC	0.4%	3.3%	76.5%	0.0%	6.6%	0.0%	0.1%	7.7%	0.5%	1.7%	0.4%	0.3%	2.5%	100.0%
CAE	3.1%	9.2%	22.8%	0.9%	17.8%	1.1%	0.0%	23.9%	1.6%	1.1%	10.2%	2.5%	5.8%	100.0%
CAN	2.0%	14.7%	39.4%	2.4%	10.8%	1.2%	0.7%	7.2%	0.0%	3.5%	4.2%	4.1%	9.8%	100.0%
CAS	5.8%	9.9%	45.9%	2.1%	8.2%	0.0%	0.0%	4.7%	0.0%	0.2%	9.1%	7.2%	7.0%	100.0%
ID	0.9%	7.1%	0.0%	0.0%	12.4%	0.0%	0.0%	77.9%	0.0%	0.0%	1.8%	0.0%	0.0%	100.0%
MT	3.4%	26.1%	0.3%	1.3%	11.5%	0.0%	0.0%	30.6%	0.0%	2.6%	2.3%	2.6%	19.3%	100.0%
NV	3.3%	18.8%	49.3%	1.1%	10.7%	0.2%	0.0%	0.0%	0.0%	4.7%	6.3%	0.7%	4.9%	100.0%
OR	2.2%	21.2%	38.0%	0.4%	3.1%	1.3%	0.0%	9.6%	0.0%	1.8%	9.2%	3.1%	10.0%	100.0%
WAE	7.6%	47.2%	7.9%	2.3%	2.7%	0.0%	0.0%	0.0%	0.0%	0.0%	22.3%	3.8%	6.2%	100.0%
WAW	2.4%	22.0%	46.3%	12.2%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	14.6%	2.4%	0.0%	100.0%

District courts were also asked to summarize their pro se case management procedures. A summary of the responses received to date is contained in Appendix G.

B. Preliminary Recommendations

1. The circuit should convene a pro se law clerk conference at least biennially. In addition to the pro se law clerk attendees, each district should consider designating one judge and/or one representative of the clerk of court to attend the conference. Topics should include trends and best practices for the case management of both prisoner and non-prisoner pro se cases. A report of the proceedings of the conference should be made available to each district promptly after its conclusion.

2. Each district should consider designating one judge who is charged with primary oversight of the management of pro se cases, including the appointment of pro bono counsel, educational materials, and staffing innovations.

3. The memoranda and proposed model local rules for vexatious litigants and early merit screening contained in Appendices C and D should be disseminated to the districts for their consideration and possible implementation.

4. Districts should be encouraged to develop mediation, early neutral evaluation, and other alternative dispute resolution methods in pro se cases. Assistance should be sought from the Ninth Circuit Standing Committee on Alternative Dispute Resolution, the Federal Judicial Center, and other sources.

5. Districts should review the prison ombudsman materials contained in Appendix F to determine whether such programs might be successfully initiated or expanded in their jurisdictions. In the absence of a circuit-wide conference on the subject, districts should involve prison officials, prosecutors, defense counsel, and public agencies in a dialogue on this subject.

6. Districts should review the pro se law clerk survey data and their own case statistics to determine whether their staffing is adequate to process both prisoner and non-prisoner pro se cases in a timely manner. If appropriate, changes in the pro se law clerk staffing formula should be pursued.

7. Districts should also review the pro se law clerk survey data, as well as the case management summaries contained in Appendix G, to assess whether they can reduce the amount of judge time in screening pro se cases of all types by adjusting their staffing and case management procedures. Districts should periodically evaluate whether their pro se case loads are best served through elbow law clerks assigned to individual judges, elbow law clerks assigned to more than one judge, or a central pool of pro se law clerks working for all judges. Consideration should be given to having certain pro se law clerks specialize in a given area, such as Social Security cases, habeas petitions, prisoner civil rights cases, and non-prisoner civil rights cases. Consideration should also be given to assigning one or more pro se law clerks the responsibility for administrative tasks such as form preparation,

development of rules and orders, and training, thereby enabling other staff to concentrate exclusively on individual case management.

III. Appointment of Counsel Subcommittee

A. Efforts to Date

This section discusses the appointment of pro bono counsel to represent self-represented litigants in the district courts in the Ninth Circuit. The first part reviews the districts' current practices. The second part sets forth "best practices" recommendations that the Task Force may wish to consider adopting as part of its final report. The proposed recommendations are of two types. First, the subcommittee makes certain recommendations designed to set forth the minimum that districts should be doing to ensure the availability of pro bono counsel where appointments are appropriate. Second, the subcommittee recommends certain additional approaches to pro bono appointment that, while not yet widely adopted, and in some cases wholly new ideas, may merit consideration by districts within the circuit. The subcommittee also comments on what might be done, at both the district and circuit levels, to ensure the effectiveness of existing pro bono appointment programs throughout the circuit.

The subcommittee also reviewed a memorandum from the Ninth Circuit Advisory Board and proposed local rule for the appointment of counsel for pro se litigants with meritorious cases. The Advisory Board proposal was based on local rules of the Northern District of Illinois. The subcommittee built on the Board's work, attempting to formulate a more concise proposal that could flexibly be adapted by districts without substantial modification. The subcommittee proposal does not address all issues covered by the Board, such as malpractice concerns of potential pro bono attorneys. The subcommittee has addressed the malpractice issue, however, in part h.(4) of this portion of the Report. The subcommittee's proposal is contained in Appendix H.

While not all pro se litigants wish to be represented, in many cases they do wish to have representation but are unable to find counsel. Focusing only on the class of cases in which pro se litigants wish to be represented, the subcommittee begins from the premise that the best way for a court to handle these matters is to appoint pro bono counsel. In order to provide a baseline for discussion, this section of the memorandum will describe what each of the districts within the Ninth Circuit is currently doing to provide pro bono counsel in cases where appointments are appropriate.

The districts within the Ninth Circuit take a wide variety of approaches to appointing counsel for pro se litigants. For example, some districts have formal programs and detailed local rules, while others appoint counsel on an ad hoc basis. Some districts appoint counsel to pro se litigants in all types of cases, while others appoint counsel only when a Title VII case or a habeas petition is filed. The source of reimbursement for costs generally is a district's nonappropriated funds, known variously as the Attorney Admission Fund or the Library Fund. Some districts work closely with local organizations, while others handle the appointment process on their own. The following section seeks to summarize the most salient features of each district's program. This summary is based upon the survey responses gathered by the Data Collection

Subcommittee.[3]

1. District of Alaska

Program: A pro se law clerk screens all pro se cases. The clerk automatically requests counsel for prisoner cases or when a litigant files an in forma pauperis ("IFP") petition. For other cases, the law clerk requests counsel only for "the most obviously meritorious cases." The requests go to the Alaska Legal Services Program or the Alaska Pro Bono Program.

Attorney Participation: Pro bono panels are seriously overburdened and the district has stated that it would be very helpful to receive the assistance of attorneys from outside the district.

Expenses: Counsel is reimbursed for expenses only in habeas cases.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: Yes.

2. District of Arizona

Program: The Federal Bar Association Volunteer Lawyer Program ("VLP") administers the pro se program for non-prisoner cases. Litigants apply to the program by filing a motion for appointment of counsel. Alternatively, a judge may refer a case to the program sua sponte if the judge believes the case is meritorious. Only civil rights and employment discrimination cases are eligible for the appointment of counsel. Prisoner cases are referred to a Criminal Justice Act ("CJA") panel attorney by the presiding judges on an ad hoc basis. A committee is considering adopting a pilot program, modeled on a District of Iowa program, that would assemble a panel of civil rights attorneys to handle prisoner cases.

Attorney Participation: VLP recruits lawyers through presentations to law firms, visits to law schools, press regarding successful cases and by honoring outstanding volunteers. The state bar association also sends a mailing to all attorneys. There are a large number of attorneys available to assist, but because 53% of cases involve at least one pro se litigant, the appointment program is not adequate to meet the need.

Expenses: Counsel is reimbursed up to $1,000. In addition, VLP has free services available, including court reporters and process servers.

General Order or Formal Guideline: Two general orders detail the procedures for obtaining reimbursement of expenses.

Counsel Appointed for Discrete Portions of Case: Occasionally counsel appointments are limited to motions or single issues. Late term appointment is disfavored.

[3] The District of the Northern Mariana Islands did not respond to the Data Collection Subcommittee's survey and its program is not discussed.

3. Central District of California

Program: The district appoints counsel only in habeas and Section 1983 cases. Appointment of counsel for habeas cases is done through the Federal Public Defender or from the CJA list. Pro se Section 1983 cases are assigned to magistrate judges. After the denial of a dispositive motion (and, occasionally before, if the magistrate judge so recommends), the magistrate judge contacts the magistrate judge who runs the district's appointment of counsel program. This magistrate judge appoints counsel from the district's panel.

Attorney Participation: The panel was created about five years ago and consists of about twenty large "downtown" law firms. Sometimes it is difficult to get these firms to accept cases that involve substantial time commitments or that involve litigants who are incarcerated in far-away locations. The program has an annual awards dinner for panel members.

Expenses: Counsel is reimbursed up to $5,000.

General Order or Formal Guideline: A general order provides procedures for the reimbursement of expenses.

Counsel Appointed for Discrete Portions of Case: It is not clear if counsel is ever appointed for discrete portions of a case.

4. Eastern District of California

Program: Upon a motion by a pro se litigant, the presiding magistrate judge screens cases for appointment of counsel. Occasionally, the presiding magistrate judge will screen a case sua sponte. If the presiding magistrate judge determines that the appointment is appropriate, the magistrate judge refers the case to one of several bodies: Prisoner civil rights cases are referred to the UC Davis Law School and, in the Fresno Division, to the San Joaquin College of Law. Habeas cases are referred to the Federal Public Defender, who either takes the case or locates counsel. About 30-40% of habeas petitioners are appointed counsel. Title VII cases are referred to a specialized district panel. To receive counsel, the litigant must show that he or she is too poor to hire a lawyer, that reasonable efforts were made to get a lawyer, and that the lawsuit is a likely winner. There are one to two appointments per year. The district does not have a process in place for appointing counsel in other types of pro se cases.

Attorney Participation: The district's civil rights pro bono panel no longer exists due to the lack of an administrator and difficulty recruiting counsel. Counsel for the Title VII panel were recruited by letter when the panel was formed. Because no recruitment has taken place since, it is sometimes difficult to find counsel willing to accept appointments. A survey respondent reported that the district could benefit from having a viable program of recruitment, training, and appointment. The respondent expressed concern, however, that even if the Task Force were to develop such a program the wherewithal to maintain it does not currently exist. Someone would be needed to administer the program. Because attorneys are involved in many other ways with the court, the respondent perceived a danger in overburdening the attorneys who were most likely to respond to the court's calls for pro bono service.

Expenses: Some deposition costs can be defrayed through a state fund. Title VII attorneys can recover reasonable expenses with pre-approval.

General Order or Formal Guideline: A general order requires the court to maintain a *Bradshaw* panel, provide for reimbursement of expenses and provide procedures for withdrawal.

Counsel Appointed for Discrete Portions of Case: It is not clear if counsel is ever appointed for discrete portions of a case.

5. Northern District of California

Program: The district's last two chief judges, over the course of their respective terms, have recruited a panel of law firms willing to accept pro bono appointments in pro se cases. The list is managed by pro se law clerks, who assist the chief judge in screening and managing litigation, including the process of acting on requests for appointment of counsel (either sua sponte or by the litigants). Counsel is appointed only after the court rules on a dispositive motion. Appointment of counsel in Title VII cases is handled somewhat differently. In San Francisco, the city's bar association maintains a list of lawyers and makes appointments when cases are referred to it by a judge. The bar association receives a $1,000 fee each time it appoints counsel for a case. The program now also encompasses Section 1983 cases. In San Jose, the court has an arrangement with the Santa Clara bar association; this association does not receive a fee, however. The district has a pilot program for employment cases called the Assisted Mediation Project, which consists of a small panel of attorneys who represent litigants solely for purposes of mediation.

Attorney Participation: The list of pro bono counsel comprises approximately 60 law firms, many of whom are consistent "repeat customers." The Assisted Mediation Project has a panel of six to seven attorneys and about a dozen pro se litigants have been represented through the project. A magistrate judge has recently taken overall responsibility to promote the district's pro bono programs among lawyers who practice in the district. That magistrate judge recently held a meeting of all lawyers in firms who coordinate pro bono work within their firms. Once a year, the district holds a reception to thank firms that have taken pro bono assignments during the course of the year. Several years ago, the chief judge appeared at a press conference with the Chief Justice of the California Supreme Court to publicize the declining participation of attorneys in pro bono work and to emphasize the priority their courts place on this form of public service. In addition, the Bar Association of San Francisco used the occasion to launch a program under which it asked all major law firms in the Bay Area to sign a "Pro Bono Pledge" and commit to devote up to five percent of its billable time on pro bono matters.

Expenses: Counsel are reimbursed up to $3,000.

General Order or Formal Guideline: Yes.

Counsel Appointed for Discrete Portions of Case: Yes, for mediation (pilot program in employment cases).

6. Southern District of California

Program: The San Diego Volunteer Lawyer Program ("VLP") administers the district-wide Federal Civil Rights Pro Bono Project. Litigants file motions for appointment and presiding judges do the screening. Civil rights, Title VII, FTCA, *Bivens*, age discrimination, ADA and Rehabilitation Act cases qualify for referral. Screening criteria include whether the plaintiff has demonstrated indigence and whether the claims are clearly not frivolous. Once the judge refers a case to the VLP, the VLP asks the litigant if the litigant wants the case reviewed for eligibility. If the litigant replies affirmatively, VLP conducts a thorough review of the case. Approximately two cases per month are referred to VLP, and VLP accepts one-third of these cases, *i.e.*, approximately eight per year.

Attorney Participation: The program recruits attorneys with presentations to large and medium-sized law firms and through MCLE programs, although attorneys recruited through MCLE programs are generally not experienced enough to take appointments. The participation level is high.

Expenses: Pre-approved expenses are reimbursed.

General Order or Formal Guideline: A local rule provides for administration of the program.

Counsel Appointed for Discrete Portions of Case: No.

7. District of Guam

Program: The district does not have a formal program. Instead, upon a litigant's motion, the court determines if the litigant is truly indigent and whether "exceptional circumstances" exist justifying appointment of counsel.

Attorney Participation: The court is familiar with the local bar and if exceptional circumstances exist, it refers cases to the Attorney Listing of the Guam Bar Association's Lawyer Referral Service. The court has appointed counsel to one case in the past several years.

Expenses: Counsel is reimbursed up to $200.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

8. District of Hawaii

Program: The district does not have a formal program. Instead, when a litigant moves for appointment of counsel, the presiding judge's law clerk screens the case. In prisoner cases, the pro se law clerk does the screening.

Attorney Participation: The pro se law clerk keeps a list of participating attorneys and individual judges may also keep lists.

Expenses: It is not clear if attorneys are reimbursed for their expenses.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

9. District of Idaho

Program: In 2001 the district created the Pro Se Pro Bono Program. Law clerks screen cases at every stage to determine whether appointment of counsel is appropriate. In addition, plaintiffs can file for appointment of counsel at any time. Counsel is appointed when the case appears to have merit or when the plaintiff is mentally ill.

Attorney Participation: The program recruited attorneys though an invitation letter signed by the chief judge and the bar commissioner, which was marginally successful. Recruiting luncheons have been more successful. But "[q]uality of counsel appears to be a problem[.]" The district also refers cases to the University of Idaho Law School.

Expenses: Counsel is reimbursed up to $1,500. Additional funds are available in extraordinary circumstances and the Chief Judge may also authorize the appointment of an expert witness or special master.

General Order or Formal Guideline: A formal guideline details the program.

Counsel Appointed for Discrete Portions of Case: Yes, for example, settlement conferences and mediation sessions.

10. District of Montana

Program: The district has no formal program, although a new local rule aims to establish a pro bono panel system. Under the current informal system, a motion for counsel from a litigant triggers the appointment process. In practice, the district appoints counsel only in prisoner cases. The presiding judge does the screening, taking into account the merits of the claim, the complexity of the claim and whether the litigant is significantly hampered in his ability to pursue the case. The proposed program would request all attorneys in the district's bar to participate in a pro bono panel. On a motion from a pro se litigant or sua sponte, the presiding judge would screen cases taking into account a number of factors. The program also has detailed rules regarding withdrawal.

Attorney Participation: For habeas cases, the district calls individual attorneys or contacts the Federal Public Defender. For prisoner civil rights cases, the court almost always turns to the same professor (and his students) at the University of Montana School of Law. Other than this professor, the district does not know of any other plaintiff attorneys who are familiar with prisoner civil rights law.

Expenses: Under the proposed program, reimbursement would be permitted "to the extent possible in light of available resources[.]"

General Order or Formal Guideline: A general order is proposed.

Counsel Appointed for Discrete Portions of Case: No.

11. District of Nevada

Program: There is no formal program. In habeas cases where the petitioner faces the death penalty or a life sentence, the district appoints counsel regardless of the petition's merits. In other habeas cases, screening is based on the length of the sentence and the merits of the petition. Appointment in other cases is "very, very rare."

Attorney Participation: For habeas cases, the district contacts the Federal Public Defender, who either takes the case or recruits someone from the CJA panel. The district doubts that attorneys would participate in a formal program. In one case, the Ninth Circuit ordered appointment and the district initially could not find anyone to work on the case; ultimately it recruited students from UC Davis.

Expenses: No mechanism exists for reimbursement.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

12. District of Oregon

Program: The district's program provides for the appointment of counsel in prisoner and non-prisoner civil rights cases. Pro se law clerks screen in-custody cases and chambers screen out-of-custody cases. If the appointment of counsel is recommended, the clerk's office is notified and the clerk sends three attorneys from the district's panel a copy of the complaint. The attorneys then indicate whether they will accept the case, whether they have a conflict or whether they decline to accept because the case is not sufficiently meritorious.

Attorney Participation: The district has a panel of 53 attorneys, which the district considers sufficient to meet its needs. However, the district does not consider itself completely successful at appointing attorneys from the panel. Five or six cases per year are referred to panel attorneys, who accept approximately one case per year and reject the rest as not sufficiently meritorious.

Expenses: Counsel may be reimbursed up to $100.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: No.

13. Eastern District of Washington

Program: The district does not have a formal program except for prisoner Section 1983 and habeas cases. Appointment of counsel is usually triggered by an IFP, although a judge may appoint counsel when the defendant files a dispositive motion. A magistrate judge usually screens IFPs for financial eligibility and the presiding Judge usually screens on the merits.

Attorney Participation: There is no panel. Instead, the presiding judge chooses an attorney it knows to be knowledgeable on the subject matter or refers the litigant to Gonzaga Law School or the Spokane County Bar Association. The "supply is adequate to meet demand."

Expenses: In some instances, expenses are reimbursed from the district's non-appropriated (attorney admissions) fund.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: Occasionally, for mediation and settlement conferences

14. Western District of Washington

Program: If an IFP is filed, the pro se law clerk screens the case. If no IFP is filed, the presiding judge monitors the case. If pro bono counsel is requested, then an external screening committee chaired by a Seattle attorney screens the case and, if appropriate, appoints an attorney.

Attorney Participation: Once a year the screening committee and a magistrate judge hold a luncheon to honor and recruit volunteers. Occasionally, the chief judge sends a letter to the bar soliciting volunteers. Since June 2002, thirteen cases have received six pro bono attorneys. Sometimes it is difficult to find counsel without a conflict.

Expenses: Counsel is reimbursed up to $1,500.

General Order or Formal Guideline: No.

Counsel Appointed for Discrete Portions of Case: Rarely.

B. Preliminary Recommendations

1. Minimums

The districts within the Ninth Circuit are diverse and many have successful and differing systems for appointing counsel to pro se litigants. As a result, a one-size-fits-all approach to handling pro se cases is not appropriate. On the other hand, each district should strive to ensure that its program includes certain minimum features.

a. A Formal Program

Each district should consider adopting a formal program that is memorialized by local rule, general order, or some other form of formal guideline. The formal program description should be published in a manner that is calculated to be read by court users as frequently as possible (*i.e.*, on a web site). Having a formal program will ensure that each district incorporates the minimum practices discussed below, such as maintaining mechanisms for screening cases, recruiting counsel, and reimbursing counsel for their reasonable expenses.

A formal program offers continuity and the assurance that all litigants will have the same minimum guarantee of access to the federal court system. Reliance on an informal system not only creates inefficiencies and inconsistencies (the characteristics of any ad hoc approach to solving a recurring problem), but also suggests a lukewarm commitment to ensuring that pro se litigants who wish to be represented have an opportunity to seek appointment of counsel.

The subcommittee recommends that each district consider the content and format of Appendix H and adapt it as warranted. The formal program should then be adopted as a local rule, general order, or other court directive.

b. A Screening Mechanism

Each district should have a mechanism to screen all pro se cases. Effective recruitment of pro bono counsel requires screening, since it steers frivolous cases away from counsel and ensures that counsel will be devoting time only to cases in which their skills are truly needed. The mechanism should specify who screens the cases, at what stage cases are screened, and what criteria are used to screen cases.

Currently, many districts consider appointing counsel only in certain types of cases, such as civil rights cases. Other districts do not consider appointing counsel unless the self-represented litigant makes a formal request. Since every litigant should have the opportunity to access the court system, the districts should ensure that pro se litigants in every type of case have the opportunity to be considered for the appointment of counsel whether or not the litigants make a request.

Districts should decide for themselves the most appropriate timing for screening cases. Currently, some districts screen when a case is filed, while others wait until a dispositive motion is brought. These varying approaches are appropriate since some districts might find it more useful to involve counsel early in the case, while others may find that waiting until a case develops aids the screening process.

Districts should also determine who is the most appropriate person to screen cases based on available staffing resources. Some districts currently refer pro se cases to a pro se law clerk who screens and monitors the cases. Other cases rely on a magistrate judge to do the screening. Still others rely on the assigned district judge to screen his or her own cases.

Additionally, each district should articulate the screening factors that it uses in order to ensure that it takes a consistent approach. The subcommittee has proposed such screening criteria in Appendix H, Section 6. A similar set of screening criteria was recently proposed by the District of Montana and provides another possible model for consideration.[4]

[4] The pertinent part of Montana's Proposed Local Rule 83.16(c)(4) states:

> The following factors will be taken into account in making the determination:
>
> (A) the potential merit of the claims as set forth in the pleading;
>
> (B) the nature and complexity of the action, both factual and legal, including the need for factual investigation;
>
> (C) the presence of conflicting testimony calling for a lawyer's presentation of evidence and cross-examination;
>
> (D) the capability of the *pro se* party to present the case;
>
> (E) the inability of the *pro se* party to retain counsel by other means;
>
> (F) whether counsel is mandated by law;
>
> (G) the degree to which the interests of justice will be served by appointment of counsel, including the benefit the Court may derive from the assistance of appointed counsel; and
>
> (H) any other factors deemed appropriate by the Judge.

c. Appointment of a Pro Bono Coordinator

The single most important thing a district can do to ensure that its pro bono program meets the needs of counsel who wish to participate and pro se litigants is to appoint a "Pro Bono Coordinator." Each district should consider appointment of a pro bono coordinator based upon court size and workload. Only by making sure that one person takes responsibility for the program can a district be sure that it has a defined and workable program and that there is consistency in the program. This approach ensures that there is someone who institutionally knows what is going on and has a commitment to the process.[5] Further, all district coordinators could meet annually under the auspices of the circuit to share information, learn from each other, fine tune their programs, and help out those districts with special needs (*i.e.*, the need for lawyers from outside the district).

d. Establishment of a Pro Bono Panel

Each district should establish its own panel of pro bono attorneys who are willing to represent pro se litigants. Districts can do this on their own or they can create an effective working arrangement with an outside group or entity, such as a bar association, a public interest law firm, a law school, or the lawyer representatives serving in the district.

Many districts have reported difficulties in finding attorneys who are willing to accept pro bono assignments. The establishment of a sufficiently large panel of attorneys will help alleviate this problem. Districts that maintain their own panel should regularly attempt to recruit new members to ensure that the panel consists of active participants. In creating panels, districts should request attorneys to specify their practice areas so that courts are best able to match attorneys to cases.

e. Securing Appointments

Each district should work to ensure that once it appoints a pro bono attorney, the attorney accepts the case. The likelihood of acceptance is highest if the chief judge or other designated judge personally writes or calls prospective counsel to offer an assignment in a case in which there is a need for pro bono counsel. There is no substitute for direct judicial involvement in the case "placement" process.

Many districts place the responsibility for securing the attorney on external organizations, although placing cases through a partner tends to be less effective than if judicial officers do it directly. The Northern District of California has tried to improve the "yield" of cases accepted by providing an incentive for good results to its outside partner, the Bar Association of San Francisco. For each successful case placement, the Bar Association of San

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[5]One indication of the importance of centralizing the administration of *pro bono* recruitment and appointment is the difficulty that the Task Force encountered in obtaining information. The Data Collection Subcommittee ultimately succeeded in obtaining a great deal of useful information, but some districts had trouble quickly compiling information on their own policies and procedures and the quality of the information they supplied varied tremendously.

Francisco receives a $1,000 fee.

One key to success is making it easy for firms to accept cases; careful preparation of case background materials, training materials, and a guaranteed stay of proceedings until counsel is ready to proceed, can all help to facilitate entry into a case. Whoever offers case assignments should be prepared to discuss the benefits of taking pro bono cases, such as training for young lawyers and the potential for success-based fee awards. It can help tremendously to cite examples of excellent experiences that law firms have had in pro bono cases. And with law firms, there is often no better leverage than peer pressure ("X,Y and Z firms have taken cases; I see that your firm has not yet done so.")

Whether assignments come from a court or from an outside entity, each attorney who accepts an appointment should receive a letter from the chief judge of the district expressing the court's appreciation.

f. Expenses

Each district should provide for the reimbursement of pro bono attorneys' out-of-pocket expenses and should provide specific guidance as to what types of expenses are eligible for reimbursement. Reimbursement provides attorneys with an additional incentive to accept a pro bono appointment. In addition, reimbursement encourages attorneys to take all necessary steps to provide their clients with effective representation.

Because the resources available to the districts differ and the expenses associated with litigating cases vary among the districts, each district should determine an appropriate maximum reimbursement amount. In addition, each district should consider whether it is appropriate to require counsel to receive pre-approval in order to be reimbursed for an expense. Alternatively, districts may require counsel to receive pre-approval for an expense that exceeds a certain amount. For example, the Central District of California requires pre-approval for the reimbursement of an expense that exceeds $500.

g. Withdrawal

Inevitably, circumstances will arise when withdrawal is appropriate, and, realistically, such circumstances will arise more frequently in cases in which pro bono counsel has been appointed than in other cases. Motions for withdrawal should be handled according to the procedures and ethical standards that apply to all cases, but, in addition, districts may wish to consider providing special rules governing appointed pro bono cases. By making clear at the outset that involuntary service is never required, special rules for withdrawal in appointed pro bono cases can ease concerns counsel may have in considering whether to accept an assignment.

h. Additional Approaches to Pro Bono Appointment That Districts May Wish to Consider Adopting

(1) Training

For any lawyer considering whether to accept a pro bono assignment, the most significant concern is often that the case requires substantive expertise outside of his or her field of practice. Thus, district courts should consider how appointed counsel may obtain training in certain substantive areas that tend to recur in pro se cases, such as civil rights, employment, social security or immigration. There are several ways to address this need. First, bar associations are in the business of providing continuing legal education courses, and courts may wish to consider requesting that courses be offered periodically in areas specifically designed to support pro bono counsel. Since direct judicial participation in continuing legal education programs is often a very effective way to ensure maximum attendance, district judges or magistrate judges may wish to consider appearing on a panel or teaching a course in areas designed to support pro bono counsel.

Second, district courts may wish to consider forming a pro bono legal education committee, chaired either by a district judge or magistrate judge or by an attorney who has shown particular leadership and dedication to pro bono recruitment in the district. A key mission of the committee would be to develop support systems for any lawyer who accepts a pro bono case, such as primer materials or ongoing consultation services with lawyers who have significant depth of experience in the specialty area in which the case arises.

(2) Advisory Counseling and Limited Representation

Arrangements in which pro bono counsel provides representation only for discrete purposes have received much attention in recent academic literature. For example, the mediation phase of litigation generally has clearly definable beginning and end points. Because any mediated resolution is, by definition, voluntary, mediation provides a unique opportunity for counsel to provide whatever guidance the client is willing to accept without much risk that counsel's advice might affect the litigation in a permanent way. Thus, districts may wish to consider pairing pro se litigants with appointed counsel for the limited purpose of assisting in mediation, as the Northern District of California has done with its pilot mediation program in employment cases involving pro se plaintiffs.[6]

Another potentially useful idea is advisory counseling. Here, there may be some overlap between the mechanisms districts establish for appointment of pro bono counsel, on the one hand, and the "self-help" mechanisms that districts establish to support pro se litigants (an area

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[6] One member of the subcommittee has strongly held reservations about any form of "unbundling," which is the term that has been used in the academic literature for limited representation. Any artificially limited representation carries with it the risk that counsel will be unable to provide fully informed advice consistent with his or her ethical responsibilities. The majority of the subcommittee recognizes that that is a serious concern, but takes the view that there may be some circumstances (such as mediation) in which limited representations may be workable and should be considered.

that is being addressed separately by the Pro Se Education Subcommittee). In requesting attorneys to undertake pro bono work for pro se litigants, district courts might wish to offer attorneys the option of staffing "self-help" centers at designated times; drafting "self-help" manuals and forms and taking periodic responsibility for updating the manuals and forms; or agreeing to be available for advisory consultation with a pro se litigant short of an on-the-record appearance by the attorney.

Providing advisory counseling to common categories of pro se litigants could prove quite helpful to the districts in managing pro se cases that are particularly difficult to handle, because of the high volume of cases in that area or the issues that tend to be involved. The burgeoning prison litigation or immigration cases in some districts are examples. If pro bono lawyers were recruited specifically to staff "self-help" kiosks at prisons or INS offices, so that pro se litigants would have an initial source of legal advice -- advice which would cover the basic requirements for filing a case, and assistance with framing a pleading if the client decides to proceed with a claim – the district courts may find that many claims that might otherwise have been filed, would never be filed, and that for those claims that are filed, pleadings are framed with better attention to threshold filing requirements.

(3) Use of Law Students

All accredited law schools are required to offer clinical courses. So long as there is overall supervision by a member of the bar, clinical programs can provide an excellent source of representation in appointed cases. There are many logistical challenges to making this approach work well (such as continuity and scheduling, since case calendars do not generally match up well with the inherently transitory nature of legal education), but these problems are not insurmountable. Rather than leaving these challenges entirely to the law school, district courts might consider establishing and providing a committee for clinical coordination services.

(4) Use of Attorney Admission Funds

The districts may wish to consider drawing from the funds generated by attorney admissions to support pro bono appointments. Although expense reimbursement mechanisms are already widely available, these funds might be used for support systems that reduce the cost of handling pro bono cases. For example, a court could place on retainer a translation service that would commit to make translators with proficiency in numerous languages available, on a pre-paid basis, for hearings, depositions, or interviews in appointed pro bono cases. Pre-paid court reporting services might be made available in the same way.[7]

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[7] In all four California districts, the Certified Shorthand Board of the State of California is required by statute to provide free court reporting services in *pro bono* cases which are not "fee generating," as defined. *See* California Business & Professions Code § 8030.2. The Eastern District makes the requisite findings in the orders appointing counsel; the Northern District uses the Bar Association of San Francisco *Pro Bono* appointment process to meet the qualification requirements. It is unclear whether this issue is addressed in the Central District and the Southern Districts, but the subcommittee's recommendation is that all California Districts adopt mechanisms in their guidelines or procedures to assure that *pro bono* cases qualify for this service.

The problem of malpractice insurance in appointed pro bono cases is another area in which districts might facilitate appointments by making admissions funds available. Professional liability insurance designed specifically to cover appointed pro bono cases is available on a pooled-risk basis. The Volunteer Legal Services Program ("VLSP"), which is part of the Bar Association of San Francisco, has for many years purchased pooled-risk coverage for all attorneys who accept pro bono cases through VLSP. Because potential errors and omissions exposure is a common concern of attorneys considering pro bono appointments, VLSP has found that this blanket policy is a valuable recruiting tool.

To the extent that it is problematic for a district court, itself, to procure services or insurance in support of pro bono attorney-client engagements, it might be useful to have an outside entity (*e.g.*, a bar association) handling at least some of the task of pro bono coordination for the court. In order to avoid having the court, itself, procure services or insurance in support of pro bono attorney-client engagements, an annual fixed contribution could be provided to an outside coordinator from attorney admissions funds, with the funds earmarked for use in specified ways.

(5) Pro Bono Service as Mandatory Requirement or Acknowledged Priority

Admission to practice law is a privilege, whether granted in the form of a state-sanctioned license to practice law or permission to practice before a specific court or agency. Sometimes, lawyers fail to appreciate that they are officers of the court and that thus there is an inherent public service component to practicing law. Since the districts have broad discretion to set the rules of practice before them, each district may wish to consider requiring members of their respective bars to undertake some minimal annual amount of pro bono service in cases pending before the court. That obligation could be fulfilled in different ways, many of which would not involve actually taking a case (thus, no one would be "forced" to take a pro bono case). First, it could be fulfilled each year, or perhaps for multiple years, by the acceptance of a single case. Second, it could be fulfilled by undertaking limited representations or doing advisory counseling, such as staffing "self-help" clinics, providing training to other attorneys who take pro bono cases, supervising law students, helping the court screen pro se cases, preparing or updating self-help manuals, or otherwise assisting the court with its administration of pro bono appointments. Or, third, it could be fulfilled by an annual monetary contribution to a fund supporting pro bono cases in the district (an additional source of funding for such things as translation services, court reporting services, or insurance).

If a district does not wish to make pro bono service mandatory, it might wish to consider, at least, advising all new admittees of the priority the district places on pro bono service. The mandatory acknowledgment of, for example, alternative dispute resolution rules in conjunction with service of a complaint is an effective device for notifying litigants of a court's procedures and expectations. An analogous approach might be considered for pro bono service. Any applicant for admission to the bar of a district might be given a letter, signed by the chief judge, explaining the priority placed on pro bono service, attaching background materials concerning the district's pro bono appointment program, and requiring a signed acknowledgment from the applicant.

i. Taking Steps to Ensure the Effectiveness of Pro Bono Appointment Programs

(1) Leadership and Administration in the Districts

The most consistent problem reported by the districts is the difficulty experienced in finding counsel to accept pro bono representation. Strong leadership by the districts' judges can make a big difference. A district may have a well-conceived pro bono appointment program, but if the program does not have vigorous, high-profile support from the court itself – in the person of the chief judge, at least, and hopefully a number of other members of the court as well – attorneys will not step forward to take cases. Every lawyer in the district should have the clear impression that pro bono staffing of pro se cases is a priority of the court.

In some districts, the chief judge routinely sends letters to members of the district's bar encouraging them to join pro bono panels. Chief judges and other judges could meet with attorney groups in their district to encourage them to participate. When speaking to a group for a different purpose, judges could mention the district's panel and request the attorneys to join. Some districts hold annual dinners or luncheons to recruit new attorneys and honor participating attorneys. Organizations that partner with districts can provide further incentives to participate by publicizing successes obtained by pro bono attorneys.

The annual district conference with lawyer representatives provides an excellent opportunity to address the issue of pro bono representation on a regular basis, with a captive audience of attorneys who, by virtue of their status as lawyer representatives – with the professional distinction and obligation of service that that entails – should themselves, by their example to other attorneys, be expected to share the leadership role in promoting the importance of volunteering for pro bono cases. Districts should consider making pro bono representation a standing agenda item at each conference.

Effective leadership is impossible without quality information about how things are actually working. Thus, the districts should consider establishing some ongoing mechanism for collecting statistics and feedback from lawyers about pro bono appointive matters. In order to gauge performance and identify trends on an ongoing basis, it is necessary to collect statistics addressing the number of appointments each year, the types of cases in which they are made, the resolution of cases in which appointments are made, and the time and expenses devoted to each case. A periodic survey of attorneys who have accepted cases would also be helpful.

(2) Leadership and Administration by the Circuit

The Ninth Circuit must take steps to help the districts in their endeavors to provide better judicial access for pro se litigants. In forming this Task Force, Chief Judge Schroeder has already shown an understanding of the importance of leadership on the issue of handling pro se litigation. Going forward, after this Task Force completes its work, it is our hope that Chief Judge Schroeder and all chief judges who succeed her will support the efforts of the districts to recruit pro bono counsel by speaking and writing periodically on the topic and generally making vigorous efforts to ensure that lawyers practicing throughout the circuit understand the high value the circuit places on pro bono service.

From an organizational standpoint, the Chief Judge might wish to consider a number of approaches to encouraging and promoting pro bono service. Appointing a standing committee comprised of one judicial officer and one attorney within each district might be helpful. Another alternative is the creation of a circuit-wide "Pro Bono Coordinator" position. This employee would be available to assist district courts to create, promote and enhance their pro se pro bono appointment programs. The employee would help districts develop a formal rule and promote attorney participation. The employee also would help organize and publicize events, such as award ceremonies, luncheons and press conferences, and would provide support for articles and speeches to be given by judges. The main idea behind the proposed "Pro Bono Coordinator" position is that someone would take "ownership" of the issue and districts would have a ready source of expertise in the "best practices" of the districts. This person would be based at circuit headquarters, but would be available on a roving basis to all districts.

In addition, the circuit might wish to consider developing a program -- maintained and promoted on its web site -- for inter-district pro bono appointments. Some districts have indicated that they lack attorneys who have both the experience and willingness to accept pro bono appointments, while others districts appear to have an excess of suitable volunteers. As a result, the circuit should institute a process for inter-district appointments and, if possible, create a fund to reimburse counsel for their travel expenses. In addition, there may be instances where a district has located an attorney who is willing to accept an appointment but who lacks the relevant experience to provide effective representation. The circuit could match these attorneys with more experienced attorneys from other districts who would mentor and advise the less-experienced attorneys.

IV. Cooperation with Prisons and Prosecutors

A. Efforts to Date

The subcommittee conducted a survey of all prisons in the Ninth Circuit. The prison officials who responded indicated that they have systems set up for the purpose of allowing inmates to grieve various prison decisions, as well as to file lawsuits in court. Most, if not all, provide assistance of paralegals to help inmates file their claims.

The legal system and prisoners' access to it, however, undoubtedly varies with each institution as to the type, quantity, and quality of help provided. Some grievance procedures are more cumbersome than others. The availability of legal material and assistance also varies. The survey did not take into account the varying educational backgrounds and mental health conditions of the inmates. These variables play a part in the effectiveness of an inmate's access to the legal system. Additional information about the grievance procedures and available resources is contained in Appendix I.

The courts' own pro se law clerks also provide a valuable resource in the orderly processing of prisoner claims. The review of pleadings by specialized staff results in claims that are understandable and that have already been reviewed to see if a cause of action is actually stated in the complaint. It is therefore important to point out to defendant agencies whenever possible that far more cases are screened out at the pleading stage than are allowed to proceed to service of process or discovery. Furthermore, most of the time an answer, instead of a dispositive motion in lieu of an answer, is needed from a defendant and therefore service must go forward.

The subcommittee found an opportunity for change in the area of service of process. It was determined that it would be very helpful for defendant agencies that represent various prisons to accept service of process in cases so that individual employees' addresses are not disclosed to prisoners. For instance, in some districts an order goes out requesting waiver of service of process from counsel believed to represent the defendant(s) with the order requiring that the counsel inform the court if counsel does not represent the defendant(s).

Concerns were raised about the ability of prisoners to send and receive legal mail. This becomes more of a problem when prisoners are transferred from prison to prison and the mail has some difficulty catching up with them. The subcommittee has not yet determined a feasible solution to this problem.

Everyone agrees that to the extent possible typed pleadings are preferable to written ones. It should be noted that the use of a typewriter by most prisoners is prohibited, however, because

parts of a typewriter can be used as weapons. The suggestion was made that the use of computers might solve this problem.

Also, on an ad hoc basis, members of the subcommittee have spoken to various defendant agencies regarding ways in which the people in the legal system could be more helpful to each other. One proposal that the subcommittee has reviewed and submitted for the readers' consideration is a prison ombudsman system suggested by Senior Circuit Judge and Task Force consultant Arthur Alarcón. The prison ombudsman concept is presented in Appendix F. Establishing a prison ombudsman program could potentially reduce court costs and unnecessary claims. In a viable program, the ombudsman is independent in fact and perception. Furthermore, the ombudsman concept is separate and distinct from the existing "adversarial" grievance process used in many prisons.

B. Preliminary Recommendations

1. The circuit should convene a meeting of representatives from the Federal Bureau of Prisons and all state correctional departments within the circuit. The twin purposes of the conference would be to improve access to legal materials, mail, assistance, and equipment; and to explore further development of prison ombudsman approaches in addition to existing grievance procedures.

2. Courts should also explore the use of court resources to develop their own ombudsman programs. For example, the Northern District of California is using a part-time magistrate judge to provide such service in one prison within the district.

3. The circuit should convene a similar meeting of representatives from all state Attorneys General and United States Attorneys within the circuit to discuss waivers of service of process and other procedures for reducing delay in prisoner cases.

4. If necessary, the circuit should seek outside funding to convene these meetings.

V. Pro Se Education Subcommittee

A. Efforts to Date

The subcommittee on pro se education was formed in order to study and evaluate what self-help materials are currently available to pro se litigants in general, whether such materials are accessible and are being utilized, whether the use of such materials is helpful to the litigant or the court, and whether more or different materials would be beneficial.

The subcommittee considered whether the district courts within the Ninth Circuit currently provide or should be encouraged to provide written self-help materials to incarcerated pro se litigants in the areas of habeas corpus and civil rights. The subcommittee learned that some districts (in and outside the Ninth Circuit) do provide such materials in the form of a "pro se manual." The subcommittee reviewed several such manuals from various districts and presented two sample manuals to the Task Force for its review and consideration. The Task Force reviewed the contents of one manual related to habeas corpus litigation and another addressed to the area of civil rights. Both manuals contained information concerning procedural and substantive law. Many Task Force members expressed concern that the manuals appear to convey legal advice, and other Task Force members challenged the accuracy of statements about the law, noting that much of the cited case law is open to various interpretations. Other Task Force members felt that the language used in the manuals was too technical to be easily understood by non-lawyers and therefore would not be particularly helpful to pro se litigants.

The tension between providing information and legal advice is apparent, and is experienced not only in the courtroom but at the intake counter of the clerks' offices. The California state courts have approved a sign to be posted in clerks' offices listing the kinds of assistance that can be provided by court staff. The text of the sign is contained in Appendix J.

After much discussion on the need to provide better education to pro se prisoner litigants, it became clear to the Task Force that individualized attention was needed in the area of habeas corpus. In light of the complexity of the substantive and procedural issues, the pace at which the law in this area changes, and the incarcerated status of habeas litigants, pro se habeas petitioners have challenges unique to their situation. Accordingly, the Task Force created a subcommittee to address these particular concerns. The interim report of the subcommittee on pro se habeas education follows in the next section of this report.

With respect to non-prisoner cases, the Northern District of California has completed a pro se manual entitled "Handbook for Litigants without a Lawyer." Although the court distributes the manual on a case-by-case basis, it also is available through the clerk's office and on the website for the Northern District of California. The subcommittee presented a condensed

version of the manual to the Task Force for its review. The full text of the manual is contained in Appendix K. A list of other educational resources provided by courts in the circuit is contained in Appendix L.

The Task Force members discussed whether the comprehensiveness of the Northern District of California manual might make it too complicated for pro se litigants and whether a simpler, shorter handout would be useful. The district subsequently reported that it also publishes discrete sections of its manual in the form of pamphlets. On the other hand, it was also felt that the completeness of the information would benefit pro se litigants. It was observed that a survey regarding pro se handouts and manuals issued by various districts through the federal system revealed a wide variety of approaches. No conclusion was reached. The subcommittee suggests that the Task Force monitor the response of the public and the court to the Northern District of California Manual, as it gains circulation, to gauge its effectiveness.

The Task Force also reviewed a draft prepared by Magistrate Judge Brazil for the Circuit's Alternative Dispute Resolution Committee. It advises potential pro se litigants of alternatives to litigation and urges persons to consider these alternatives before filing. Members of the Task Force thought the draft was well written, thoughtful and very helpful There was some concern, however, that the tone of the draft could be perceived as too discouraging to pro se litigants. One thought would be to have such a publication issued by an organization other than the court in order to mitigate that concern.

The subcommittee also surveyed the bankruptcy courts within the Ninth Circuit and determined that most bankruptcy courts have no specific programs for pro se litigants. Some districts, however, do have appointed counsel programs. Such programs tend to be found only in large urban districts or have been developed under the auspices of a specific judge or lawyer. These programs usually are administered by a public interest law firm which provides malpractice insurance. Administration by an entity outside the court avoids the potential problem of court staff being perceived as either giving advice or acting in their self-interest. Once a pro se litigant files in bankruptcy court, he or she is made aware of the appointed counsel program. Unfortunately, pre-filers still are vulnerable to bankruptcy petition preparers. The Central District of California uses an annual award recognition luncheon, paid for from the attorney admission fund, to honor the volunteers.

In order to determine whether existing self-help materials are adequate, the subcommittee has gathered additional data on the nature and availability of self-help materials that currently exist within our circuit. See Appendix L for a summary of materials available from various courts.

B. Preliminary Recommendations

1. District courts should review the educational materials, if any, available to pro se litigants and evaluate whether they could be doing more to provide information about court procedures. The Table of Contents of the manual contained in Appendix K provides a useful checklist of topics suitable for information sheets or pamphlets.

2. Courts should encourage local law schools and bar associations to develop educational materials for pro se litigants. The circuit's lawyer representatives could also assist in that effort. Assisting in the preparation of educational materials is one means of discharging a lawyer's pro bono responsibilities.

3. Particular attention should be directed to providing information on service of process and appropriate methods of bringing matters to a court's attention. Each court should review its procedures and determine whether letters from pro se litigants are appropriate. This policy should then be communicated to pro se litigants.

4. The California state courts have developed the position of a small claims court advisor to provide basic information to and answer the questions of litigants. District courts should examine, where feasible, the possibility of providing a similar resource through the auspices of a local law school or bar association. Such state court initiatives as legal information kiosks, self help centers, forms, and signs should also be considered.

5. If authorized by the courts, clerks' offices should consider providing access to case management/electronic case filing (CM/ECF) and related training materials for pro se litigants.

VI. Habeas Corpus Education

A. Efforts to Date

After much discussion on the need to provide better education to pro se litigants, it became clear to the Task Force that individualized attention was needed in the area of habeas corpus. In light of the complexity of the substantive and procedural issues, the pace at which the law in this area changes, and the incarcerated status of habeas litigants, pro se habeas petitioners have challenges unique to their situation.

The subcommittee considered various options on how to improve the availability of educational materials. The subcommittee discussed what materials already were available, whether self-help information should come from the court or a separate entity, at what stage of the proceedings distribution of material would be most effective, and whether it was appropriate for the Task Force itself to become involved in the promotion, creation, distribution or monitoring of such materials.

The subcommittee was cognizant of a concern expressed by a majority of the Task Force members that any information coming from a court, or appearing to come from a court, should not cross the line between presenting information and giving legal advice. Some members believe it would be difficult for a court to disseminate information without the perception of giving legal advice. Others expressed concern about the constant changes in the applicable law and the need to timely and consistently update educational materials. Due to the limited duration of the Task Force, some members questioned whether the Task Force should be involved in promoting, creating or facilitating self-help manuals of any kind.

The subcommittee considered the amount of information currently being provided to pro se habeas petitioners. With respect to the most basic procedural aspects of habeas corpus litigation, there is a form petition annexed to the Federal Rules following 28 U.S.C. § 2254 which has been made available to prisoners as part of a form adopted by each district court. These forms contain sufficient information to allow a prisoner to successfully initiate a habeas action in the vast majority of cases. Additionally, the Advisory Committee on Criminal Rules recently has recommended changes to that form, along with changes to the rules themselves, as part of a general restyling of the Rules to make them more easily understood. Moreover, the protections afforded pro se prisoners in the civil rights context have been extended to pro se habeas petitioners (specifically the requirement that notice of pleading defects and the opportunity to correct them be given prior to dismissal), thereby reducing the possibility that lack of education could result in dismissal of a potentially meritorious case.

Despite the form petition and court-afforded protections against premature dismissal, the subcommittee believes that pro se habeas petitioners could use additional assistance in the more complex procedural aspects of habeas litigation. These include the method of presentation of the claims both to the state courts for exhaustion purposes, and the federal courts for clarity, as well as the one-year time limitation.

The subcommittee considered the option of providing information to prisoners who might potentially file federal habeas petitions. The concept of distributing pre-filing information could benefit both the litigant and the court. For example, information on timeliness and exhaustion could be valuable to the pro se habeas petitioner prior to filing. In addition, potential defects in pleading possibly might be cured prior to filing, thereby reducing utilization of court resources in dismissing petitions with leave to amend and/or issuing other interim and remedial orders.

The subcommittee presented examples to the Task Force members of notices sent to pro se habeas petitioners in the Southern District of California. It became clear that such notices by their nature must be updated and changed often, as new case law is frequently announced in these areas. Therefore, it was decided that it would be impractical to make a manual available in written form. Because the only practical method of making information available would be electronically, a medium typically not available to prisoners, the idea of a self-help manual did not appear to be a viable means of supplying habeas information to prisoners.

The subcommittee also considered the viability of providing pro se habeas petitioners with information after they already have initiated an action by encouraging individual districts to adopt a standardized notice procedure similar to that of the Southern District of California. The pro se law clerks, however, have previously attempted such an approach without success. The main problem is a lack of consensus with regard to not only the substantive meaning of relevant case law but also the timing of giving certain information to the pro se petitioners. Some people do not believe it is appropriate to present information to petitioners before it is necessary to do so, and there is a lack of consensus regarding case holdings with respect to what a district court is *required* to do as opposed to what it has the *discretion* to do. Because opinions on these subjects vary from district to district as well as within districts, and because the pro se law clerks have already made the individual districts within the Ninth Circuit aware of the types of notices which have been distributed to prisoners, no further action is contemplated by the subcommittee in this regard.

The subcommittee also considered the option of whether a self-help manual could be distributed and updated by an entity outside the court. The chair of the subcommittee approached the Post-Conviction Justice Project at the University of Southern California to determine whether it had any interest in preparing a self-help manual for habeas petitioners. Interest in the idea was expressed, but only upon the condition that there would be assurances that the manual would be made readily available to the prisoners. Because the Task Force is of limited duration, some members wondered whether it was practical for the Task Force to promote or become involved in the distribution of written materials that would require updating and monitoring at a time when the Task Force will no longer exist.

B. Preliminary Recommendations

1. Because education of prisoners is lacking, particularly in the areas of procedure and pre-filing requirements, each court should evaluate the information it currently provides and determine whether it can or should do more.

2. Although it is not practical for the Task Force to be directly involved in the creation, distribution or update of any written self-help materials, courts should explore whether any law school or bar association would be willing to assume such responsibilities.

3. The circuit should create a directory of information and make it available to prisons, perhaps electronically, in order to direct pro se habeas petitioners to materials that are already available.

4. The subject of habeas educational materials should be addressed at any circuit court or district sponsored conference with prison wardens and/or prosecutors.

5. State-federal judicial councils should explore a coordinated system of post-conviction relief in state and federal courts. Possible options include publication of a post-conviction relief manual for each state, and a regional state-federal conference devoted to a coordinated system.

VII. Data Collection Subcommittee

A. Efforts to Date

This subcommittee's mission is to gather data from each of the districts within the Ninth Circuit in order to better understand the issues posed by pro se litigation.

Existing research on pro se litigants in the Ninth Circuit has largely been gathered by the Administrative Office of the U.S. Courts. While the Federal Judicial Center (FJC) has compiled reports on this data, the accuracy of their numbers is unknown; the statistics depend on how cases are reported and have not been checked for accuracy with the districts. Improved data tracking systems are critical to ensuring more reliable information. In order to educate the Task Force about this available data, a representative from the FJC presented related charts in July 2003 and the presentation materials are included in Appendix M. The numbers of pro se litigants involved in different case types are quantified for each district within the circuit. Updated data for 2003 counts 43,350 pro se civil cases in district courts, up from 41,174 in 2002.[8]

Beyond the statistical reports from the FJC, there was previously very little research on pro se issues in the Ninth Circuit. Accordingly, the subcommittee conducted interviews and surveys to assess (1) procedures for review of claims related to in forma pauperis applications, (2) district standards for appointment of counsel, and (3) pro se law clerk functions. The information that was gathered can be found in the relevant sections.

Due to the Task Force's limited resources, research on both the Court of Appeals and the bankruptcy courts could not be extensive. The relevant information about pro se procedures for the Court of Appeals is included in Section II of this report. Regarding the Ninth Circuit Bankruptcy Courts, some information about case processing is also included in Section II, and a survey was conducted by Bankruptcy Judge Vincent Zurzolo as well. The survey aimed to assess the availability of pro bono services and revealed that, of thirteen respondents, six courts have pro bono programs for pro se bankruptcy litigants. How these programs are administered varies by court.

The data that has been gathered by the subcommittee is not an adequate substitute for reliable numbers generated from the case filings themselves. As noted above, the Administrative Office of the United States Courts maintains statistics on certain limited categories of pro se cases, such as prisoner petitions and prisoner civil rights complaints. Their data are based on "nature of suit" numeric codes entered into a SARD database. Certain other categories of pro se cases, such as non-prisoner employment discrimination or contract claims, do not have specific nature of suit codes. The ICMS civil system presently in use by some courts does not permit courts to generate pro se case data automatically; rather, it requires that a "flag" be set at the opening of

[8]Tim Reagan, Statistics on pro se litigation provided to the Task Force on Self-Represented Litigants on September 22, 2004.

the case to designate a party's pro se status and to generate reports reflecting such information as to dates of filing and closure and whether the pro se party is a prisoner. The system requires certain scripts to be followed and depends entirely on accurate docketing of party field information by intake and docket clerks. Furthermore, there is currently no incentive to take these additional steps in order to obtain additional staffing, as courts presently receive no staffing credit for non-prisoner pro se cases.

Some courts have converted to an electronic case management and electronic case filing system (CM/ECF) and other courts are in the process of making that transition. The initial case set-up permits court staff to click on a box indicating pro se status. However, at various points in a case counsel may be appointed or dropped, and defendants may file counterclaims or third party claims that result in the addition of pro se parties. Without careful training of those who are expected to file electronically, and careful oversight by court staff, the pro se statistics generated under CM/ECF may be only slightly more reliable than data captured under the ICMS system. Moreover, even where a court makes electronic filing "mandatory," some courts may exempt or even prohibit pro se litigants from using CM/ECF, at least initially. Thus, some courts will be operating under a hybrid system for some period of time.

B. Preliminary Recommendations

1. Steps should be taken to ensure that clerks' offices receive adequate training and written instructions regarding the importance of collecting and maintaining data in pro se cases.

2. Under CM/ECF, the status of pro se litigants should be "flagged" so that standard reports can be generated to track pro se cases (both prisoner and non-prisoner) by nature of suit and stage of disposition.

3. The Administrative Office of the U.S. Courts, in conjunction with the courts, should customize CM/ECF on a national basis so that standard reports can be generated that reflect all categories and types of pro se litigants, the status of each case, and the disposition by stage of proceeding. Case aging reports should be available on all pro se cases.

VIII. Conclusion

The Task Force will carefully consider all comments received on this interim report in crafting a final report following additional meetings.